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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

WATSON STEWART, APPELLANT,

v.

THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

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STATEMENT.

The claimant, Watson Stewart, was, on May 12, 1869, duly appointed and commissioned register of the United States land office at Humboldt, in the State of Kansas, and served continuously from said date until November 20, 1871.

Under a treaty between the United States and the Osage Indians, made September 29, 1865, and ratified by the President January 21, 1867, the lands in the State of Kansas belonging to said Indians were ceded to the United States and afterwards sold by the United States in accordance with the terms provided in said treaty. (Record, p. 2.) Appropriate legislation was passed by Congress to carry into

effect the terms of the treaty and the Secretary of the Interior issued his instructions governing the sale of said lands to the register and receiver of the land office at Humboldt, Kans. (Record, pp. 7 and 8.) On March 28 and 31, 1871, further instructions were issued to the registers and receivers concerning the sale of lands contained in the "diminished reservation," which were authorized to be sold by the act of July 15, 1870, in conformity with section 16 of the treaty. (Record, pp. 9 and 10.)

The compensation for registers of the United States land office at that time consisted: First, of an annual salary of $500; second, a fee of $1 for each declaratory statement; and third, a commission of 1 per cent on all moneys received at each receiver's office. There was the further provision which is now found in section 2240, Revised Statutes, as follows:

> The compensation of registers and receivers, including salary, fees, and commissions, shall in no case exceed in the aggregate $3,000 a year each, and no register shall receive for any one quarter or fractional quarter more than a pro rata allowance of such maximum.

The maximum compensation of $3,000 per annum was duly paid by the United States to the claimant. (Record, p. 10.)

The act of March 3, 1903, conferred jurisdiction upon the Court of Claims to hear and determine the claim of registers and receivers of the United States land office in the State of Kansas, who were charged with the disposal of Osage ceded, Osage

trust, and Osage diminished reserved land in said State. (Record, p. 1.) Under this act, the claimant filed his petition praying for judgment in the sum of $23,104.44, as commission on sales of said Osage ceded land, Osage trust, and diminished reserved lands. (Record, pp. 4 and 5.) The cause was heard and determined by the court below March 21, 1904, and judgment ordered to be entered dismissing claimant's petition. (Record, p. 15.)

THE ISSUES.

Claimant contends:

First. That the services performed by him in connection with the sale and disposition of said lands were not within the line of his duty as register of the land office.

Second. That he is entitled to recover fees and commissions for said services beyond the maximum compensation of $3,000 per annum provided for registers of the General Land Office.

The Government's contention is:

First. The statute fixed the compensation of registers, the maximum amount of which was $3,000 per annum, and the services performed by claimant in connection with the sale of said lands were within the line of his duty as register of the United States land office.

Second. That the services rendered by claimant were in and by virtue of an express contract between the claimant and the United States, which contract

has been fully executed and performed and, therefore there is no implied contract or quantum meruit upon which to base an action for recovery.

ARGUMENT.

The petition, in referring to claimant's duties, alleges, "His duties as register of the said land office were prescribed and defined by the statutes of the United States and consisted of services in the disposal of public lands of the United States." (See par. 3, record, p. 2.)

Again quoting from the petition:

> Said Osage ceded and Osage trust and diminished reserve lands were not public lands of the United States, but were private lands belonging to the Osage tribe of Indians, and it was no part of the duty of the claimant as register of a United States land office to assist in disposing of said Osage ceded and Osage trust and diminished reserve lands. (Par. 5, record, p. 2.)

A large area of these lands were, by article 1 of the treaty, granted and sold to the United States, and in consideration of said grant and sale the United States agreed to and did pay the sum of $300,000 to said Osage tribe of Indians.

Article 1 of the treaty provides that "the tribe of the Great and Little Osage Indians * * * do hereby grant and sell to the United States the lands contained within the following boundaries * * *. And in consideration of the grant and sale to them

of the above described lands, the United States agrees to pay the sum of $300,000, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States."

Here, then, is an absolute provision whereby the *United States became the owner in fee of the lands set forth in article 1 of the treaty, and, therefore, they were public lands of the United States and at the time they were sold and disposed of by the United States were not private lands belonging to the Osage tribe of Indians, as alleged in said petition.* These lands described in article 1 of the treaty have been termed "Osage ceded lands."

Article 2 of the treaty provides that "the said tribe of Indians also hereby cede to the United States a tract of land 20 miles in width from north to south, off the north side of the remainder of their present reservation and extending its entire length from east to west; which land is to be held in trust for said Indians and to be surveyed and sold for their benefit by the Secretary of the Interior, under such rules and regulations as he may from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold." (See treaty with the Osage Indians, 14 Stat. L., pp. 687–688.)

These last described lands have been termed "Osage trust lands." The proceeds of the sales of said Osage trust lands by the terms of the treaty were placed in the Treasury of the United States to the credit of said tribe of Indians, excepting that cer-

tain percentage of the net proceeds were to be placed to the credit of the school fund of said Indians.

Article 16 of said treaty provided that should the Indians agree to remove from the State of Kansas and settle on lands in Indian Territory provided for them by the United States "then the diminished reservation" shall be disposed of by the United States in the same manner and for the same purpose as hereinbefore provided in relation to said trust lands.

Notwithstanding that article 2 of the treaty provides that the lands therein described shall be held in trust, they were nevertheless ceded to the United States and became subject to its disposal in accordance with the terms of the treaty as other lands of the United States were disposed of and sold. The disposition of the "diminished reserved lands" follow the same rule, and became such lands in the disposition of which registers and receivers were required to perform the same duties as in the disposition of other lands belonging to the Government.

The Osage ceded lands described in the first article of the treaty became absolutely the property of the United States and were to be disposed of as follows:

> Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws, but no preemption claim or homestead settlement shall be recognized.

Furthermore, as to the Osage trust lands article 2 of the treaty provided that the lands should be

sold by the Secretary of the Interior under such rules and regulations as he may from time to time prescribe under the direction of the Commissioner of the General Land Office as other lands are surveyed and sold. While as to the Osage "diminished reservation," article 16 of the treaty provided that the lands should be disposed of in the same manner as the Osage trust lands.

The Secretary of the Interior being charged, under the terms of the treaty, with the disposition and sale of these lands the same as public lands of the United States, undoubtedly had the authority to use the same machinery in the disposition of the lands that was required in the sale and disposition of the public domain, and the register and receiver being part of that machinery acted in their official capacity, and therefore the claimant is not entitled to additional fees and commission beyond the maximum compensation of $3,000 per annum provided by law.

The services were rendered under and by virtue of an express contract entered into between the claimant and the defendant, which has been fully executed and performed by both parties; hence no implied contract or quantum meruit can exist.

The contract between the claimant and the United States were letters of authorization and the acceptance of the terms contained therein. The terms were as follows:

> The register and receiver will be allowed a commission of 1 per cent on the proceeds of

> the sale of these lands, with limitation, as a matter of course, to the legal maximum of $2,500, inclusive of commissions, fees, etc., on the disposal of the public lands, the payment of which is to be made by the receiver in his capacity of disbursing agent, and to be debited in a special account, together with such other expenses incident to the sale of the lands alluded to as may be authorized by law and instructions. (See record, p. 9.)

And again:

> Nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum fees and commissions of $2,500 per annum now allowed by law, and the receiver in adjusting his accounts shall take care to first ascertain how much short of the maximum the receipt from public lands, including the fees received from the declaratory statement on the Osage lands, will bring their fees and commissions, and will then charge to the Indian fund only so much commissions as will bring their compensation to the maximum. (Record, p. 10.)

The terms of this employment were duly accepted by the claimant, who, as the record shows, would not otherwise have received the maximum compensation, because of insufficient sales of strictly United States public lands to make up that amount in commissions. The terms having been accepted, the services were rendered under this contract of employment; the payments were made to the claimant under the contract of employment and were received by him without objection or without protest or with-

out claim for any additional or extra compensation. There being, then, an express contract of employment between the claimant and the defendant, fully executed upon both sides, it follows inevitably that there can not be an implied contract in the matter, and that the claimant can not recover from the Government upon a *quantum meruit*, unless it be first shown that the express contract was rescinded or abrogated by consent of the parties.

It is just as impossible to have an express contract and an implied contract coexisting concerning the same subject-matter at the same time as it is for two physical objects to occupy the same space at the same time. The ground of a legal implication is that the parties to the contract would have expressed that which the law implies had they known of it or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties make express provisions the reason of the implication fails; and the law by implications will never overcome such express provisions made by the parties to the contract. (2 Parsons on Contracts, 8th ed., bot. p. 631. See also Texas Pacific case, 28 C. Cls. R., 379, 390.)

This doctrine is nowhere better stated than by this court in its decision in the case of *Hawkins* v. *United States* (96 U. S., 689). In that case Mr. Justice Clifford said:

> Two facts are the chief reliance of the claimant, to wit, (1) that the stone delivered is better than that which the claimant contracted to furnish; (2) that the United States

accepted the material and is now in full enjoyment of the same. Based on these facts, the proposition of the claimant is that he is entitled to recover the actual value of the materials, without reference to the contract price, which can not for a moment be admitted, as the findings show that the written contract was in full force and operation, no attempt having been made by either party to vary or rescind it, and that the claimant acted under it in furnishing and delivering the stone, and that the public authorities also, in adjusting his accounts and in making the payments referred to, conformed in all respects to its terms, stipulations, and conditions. * * *

Express stipulations can not in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties. Hence, the rule is that if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he can not under such circumstances recover upon a *quantum meruit.* (1 Story, Contr. (5th ed.), sec. 18; *Selway* v. *Fogg,* 5 Mees. and W., 83; *Creighton* v. *City of Toledo,* 18 Ohio St., 447; *Weston* v. *Davis,* 24 Me., 374; *Whiting* v. *Sullivan,* 7 Mass., 107; *Merrill* v. *The Ithaca and Owego Railroad Co.,* 16 Wend., 586; *Glacius et al.* v. *Black,* 50 N. Y., 145.) * * *

Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party can not be bound by an implied promise when he has made an express contract as to the same subject-matter, which is certainly sound law, unless the express contract has been rescinded or abandoned. (Chitty, Contr. (10th ed.), 62; *Tousaint* v. *Martinnant*, 2 T. R., 100; *Cutler* v. *Powell*, 6 *id.*, 320; *Ferguson* v. *Carrington*, 9 B. and C., 59; *Atherton* v. *Dennett*, Law Rep., 7 Q. B., 327.) * * *

Jurisdiction is not conferred upon the Court of Claims to allow mere extra allowances in a case where there is no promise to that effect, either express or implied. Power to hear and determine claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress, is vested in the Court of Claims. Mere applications for extra allowance, unsupported by any contract, express or implied, must be made to Congress, where alone they can be properly entertained. (Rev. Stat., sec. 1059.)

The Brindle and Rogers cases.

The case of the *United States* v. *Brindle* (110 U. S., 688) cited by counsel has no application here. That was a case of the enforcement of implied assumpsit for work and labor done at the request of

the defendant and by it accepted and enjoyed without any express contract as to compensation. In that case the court said:

> When, therefore, Brindle was appointed special receiver and superintendent to assist the special commissioner in disposing of the trust lands, he was employed to render a service in no way connected with the office which he held. * * * In legal effect, the appointment was to an agency for the sale of lands for the Indians, *with an implied understanding* that a reasonable compensation would be paid for the services rendered. In so far as anything appears in the record, the appointment was not made because Brindle was receiver of the land office. The duties to be performed were of a different character and in a different place from those of the land office; *and while the exact amount of the compensation for this service was not fixed*, it was clearly to be inferred that such compensation as the law implies where labor is performed by one at the request of another—that is to say, a reasonable compensation—should be paid.

But there is a distinct line of demarcation between the foregoing facts and the case at bar.

Here the employment was made for the very reason that Stewart was register of a United States land office, and his compensation for the service was expressly stipulated in the contract of employment. There being, then, in the case at bar an express contract between the parties fully executed and per-

formed, there is, of course, no ground for implication of a different measure of compensation, and hence the Brindle case has no application.

Counsel for the claimants also cite the case of *United States* v. *Rogers* (81 Fed. R., 941), saying that it is even more directly in point than the case of Brindle. We think this case even less in point than that of Brindle. The Rogers case was an action by the United States against the sureties upon the bond of a receiver of the land office, and in which the court, applying the doctrine of *strictissimi juris*, held that, inasmuch as the reception of the funds arising from Indian lands was not a part of his official duties as the receiver of the land office, and was not a part of the funds for which the obligor on the bond had become liable to the United States for the safety thereof, therefore the surety upon the bond was not obligated to pay for any defalcation in such funds. Of course a surety upon the bond is only liable for the very identical thing that the bond calls for; and a complete defense to any suit against the surety upon a bond for the slightest deviation from the terms of the bond itself is *non hæc in fœdera veni*. In that case the surety upon the bond entered into an obligation to become responsible for the safe-keeping of funds arising from sales of the public lands of the United States. He did not enter into a bond to become surety for the safe-keeping of the proceeds of the sale of Indian lands, and hence, of course, the Government could not recover upon the bond.

The court below, in distinguishing the Brindle case from the case at bar, said:

> The case of Brindle (110 U. S., 688), upon which much reliance is placed by counsel for claimant, is easily distinguished from the case presented here. In that case it was said that, so far as anything appeared in the record then before the court, the appointment of Brindle was not made because he was receiver of the land office. In the present case no specific personal appointments were made, but the registers and receivers generally were designated to perform the service, and the duties were assigned to their respective offices without regard to the personal incumbents then existing. Claimant was not at the time of such designation and assignment of duties a register, but was appointed, and accepted such appointment, after the disposal of the ceded and trust lands had been attached to the office in which he qualified, and thereby obligated himself to perform all such duties as appertained thereto. The disposal of the diminished reserve lands was later included, but by continuing in the service claimant must be considered as having acquiesced in that action. Having voluntarily assumed to discharge all the duties of the office, he must be presumed to have known what the duties were and that the services for which he now seeks further compensation were engagements included in his acceptance of the office at the time he entered upon the performance of its duties, which is further evidenced by his continued

> service without objection, and for the designated compensation. In the present case the appointment of claimant to the office of register included the appointment to do the business appertaining to the sale of the identical lands in question, without special mention. (See record, pp. 14 and 15.)

Under the treaty these Osage lands were to be sold upon the most advantageous terms to the Indians, and under such rules and regulations as the Secretary of the Interior might from time to time establish. Now, one of the rules and regulations which the Secretary of the Interior did establish for the sale of these lands upon the most advantageous terms to the Indians, was that the same were to be taken charge of by the register and receiver of the United States public land office, and that no compensation was to be paid to such register and receiver other than an amount sufficient to make up the maximum compensation of the office as prescribed by law. It certainly can not be doubted that the Secretary of the Interior, under the aforesaid treaty stipulations, had full authority to make such a regulation.

We may concede that the claimant might have refused to accept the terms provided by the Secretary of the Interior, but the fact remains that he did accept the employment upon the conditions designated by the Secretary and probably did so because the sale of the strictly public lands of the United States were not sufficient to give him the maximum compensation fixed by law, and, therefore, there was ample consid-

eration for accepting the employment. Having accepted the employment under the terms and conditions provided by the Secretary, and having performed the duties under these terms and received payment therefor without objection or protest or claim for extra compensation, the claimant is bound by his contract and should not now be heard in his demand for additional compensation.

Quoting from the opinion of the court below—

> While the rules and regulations so prescribed by the Secretary of the Interior were in force the claimant accepted the appointment and qualified as register. He performed the services so required of him, and received the maximum compensation provided therefor by law and the regulations of the Secretary of the Interior without objection or protest, or claim for more compensation, so far as we discover in the record, until in February, 1902, thirty years after the last service was performed, when he initiated this claim in Congress, and by them it has been sent to this court for our determination. We are of the opinion that claimant voluntarily undertook to do, and did perform, the services described in his petition for the compensation he has already received, and that neither the United States nor the Osage Nation is liable to him for further compensation, nor did such liability exist at any time. (See opinion, record, p. 14.)

THE SECRETARY'S INSTRUCTIONS.

Under the heading "Department ruling not conclusive" (claimant's brief, p. 15), counsel says:

> Where officers of the Government in good faith comply with such rulings of their superior officers, they lose no rights by so doing. They are not bound to put themselves in the position of contentious and disobedient officers. Their compliance with their instructions, so far from constituting an agreement to a contract, express or implied, puts them in a position peculiarly favorable for the assertion of their rights in the courts in opposition to such rulings where the rulings are found to be erroneous.

For the purposes of this case we may concede every word of the foregoing doctrine, but here we meet the claimant with the fact that when these instructions of the Secretary of the Interior were first issued to the register and receiver of the land office in Kansas the claimant was not a register and that he was not appointed as such register until sometime after the first instructions were issued by the Secretary, and after a part of these Osage lands had been sold under such instructions. (Record, p. 15.) The claimant knew, or had the opportunity to know, just what his predecessor had been required to do and he entered upon his duties upon receiving his commission with the full understanding that he was to dispose of these lands under the instructions of the Secretary as given to the claimant's predecessor. These instructions

were supplemented by similar instructions after claimant's appointment. (See record, p. 9.) Therefore claimant was at liberty to refuse the appointment as register if he was not willing to accept the conditions concerning the sale of these Osage lands.

Furthermore, as shown in the record, the claimant never made the slightest protest or objection that he was not satisfied with the maximum compensation of $3,000 per annum. A protest by him could not be construed as insubordination or as rendering him amenable to the charge of being a "contentious or disobedient officer."

We have examined the various cases cited by claimant and without hesitation say they have no application to the case at bar.

EXPENDITURES SHOULD BE CHARGED AGAINST THE INDIAN FUND.

The special act under which this claim is prosecuted provides that any one or more of the registers and receivers of the United States land offices in the State of Kansas, upon whom was imposed the responsibility of making sale and disposal of the Osage lands, may bring suit in the Court of Claims against the Osage Nation and the United States to determine the claim for commissions or compensation connected with said sales. (Record, p. 1.)

The treaty provided, as seen by article 2, that the proceeds of such sales, after deducting all expenses incident to the proper execution of the trust, should be placed in the Treasury of the United States to the

credit of said tribe of Indians. The lands were duly sold by the United States and the proceeds deposited, as required by the treaty.

If, however, it shall now be determined that these registers and receivers, who are authorized to bring suit under this special act, are entitled to their filing fees and to a compensation of 1 per cent of the proceeds of these sales beyond the maximum amount of $3,000 per annum, it can not be doubted but that such expenditure must be considered a part of the cost of the sale of the lands, and hence should be charged against the Indian fund and not paid out of the public treasury.

It is confidently submitted that there is no cause of action presented in the petition, and that for the foregoing reasons, supplementing the forceful opinion by Judge Wright, we contend that the judgment should be affirmed. Any further discussion of the issues involved would be a matter of weariness to the court.

Respectfully submitted.

J. A. VAN ORSDEL,
Assistant Attorney-General.

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